81-2371

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO._____

John C. Amis, Jr., President
Amey + Monge, Inc.
Petitioner,

vs.

Internal Revenue Service
Charles O. DeWitt
Respondent.

On Appeal from the Eleventh
Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Eleventh Circuit

John C. Amis, Jr.
In Propria Persona
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June, 1982

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QUESTIONS PRESENTED FOR REVIEW

In denying Attorney fees and costs to Appellant, did the Eleventh Circuit err and render a decision in conflict with the D. C. Court of Appeals?

Did Congress, when it enacted Public Law 93-579, intend that Pro Se litigants in Freedom of Information Act and Privacy Act cases be paid Attorney fees and costs?

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In the

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John C. Amis, Jr., President

Amey + Monge, Inc.

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vs.

Internal Revenue Service

Charles O. DeWitt

Respondent.

Appellant contends that in denying Attorney fees to Appellant, the Eleventh Circuit erred and came in conflict with the D.C. Circuit.

The Supreme Court has jurisdiction under Article III of the Constitution of the United States and under 28 U.S.C. 1253.

OPINION BELOW

The Opinion of the Eleventh Circuit Court of Appeals is appended.

PROCEDURAL GROUNDS FOR JURISDICTION

The District Court, without a hearing, denied Attorney fees and costs to Appellant.

The Opinion of the Eleventh Circuit Court of Appeals affirmed the Judgment of the District Court.

Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals on April 9, 1982.

This Appeal is being docketed in the Court within 90 days from the Opinion of the Eleventh Circuit Court of Appeals. Dated March 30, 1982.

STATEMENT OF THE CASE

This Appeal arises from the district court's denial of the request of the Appellant, John C. Amis, Jr., for Attorney fees under section 552(a)(4)(E) of the Freedom of Information Act (FOIA). The principal issues for review are whether Amis, a Pro Se litigant, who brought action, may recover Attorney fees under section 552(a)(4)(E).

After months of litigation, the Appellees decided to release the information rather than submit to an in camera inspection as ordered by the Court.

Although Amis has substantially prevailed in this litigation within the meaning of section 552(a)(4)(E) the Court held that he was not entitled to an award of Attorney fees.

Appellant instituted this litigation on October 2, 1980, after having exhausted all administrative procedures, to obtain the records of Amey + Monge, Inc. The government resisted disclosure of the records and the case was argued before the United States District Court for the Middle District of Florida. At the hearing on January 7, 1982, the Court ordered the Defendant to comply with detailed justification, itemization, and

indexing in a form to comport with Vaughn v. Rosen, 484 F2d 820 (D.C. Cir. 1973).

The Appellees decided to release the information instead of complying with the Court's order.

After the documents were released, Appellant filed for Attorney fees and costs, but the Court denied the request.

REASONS FOR GRANTING CERTIORARI

Congress has specifically provided for the award of Attorney fees in FOIA suits by enacting section 552(a)(4)(E). The legislative history of that section is extensive and illuminating. Congress realized that too often the insurmountable barriers presented by Court costs and attorney fees to the average person requestion information under the FOIA enabled the government to escape compliance with the law. Recognizing that the FOIA had established a national policy of public disclosure of government information, Congress found it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorney fees against the government where the complainant prevailed in FOIA litigation.

The Senate version of what was to become section 555(a)(4)(E) specified four criteria to be considered by the Court in exercising its discretion to award attorney fees: (1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law. The conference substitute followed the Senate version except that the criteria set forth above were eliminated. The conference report explicitly states, however that by eliminating these criteria the conferees did not intend to make the award of attorney fees automatic or to preclude the Courts, in exercising their discretion in awarding such fees, from taking such criteria into consideration. Instead

the conferees believed that because the existing body of law on the award of attorney fees recognized such factors, a statement of the criteria would be too delimiting and therefore was unnecessary.

The appellees contend that since the documents were released voluntarily and not as the result of a court order or judgment, the appellant did not substantially prevail and therefore is not eligible for an award of costs and attorney fees. This contention has no merit. Recent court decisions and the legislative history of section 552(a)(4)(E) support a contrary conclusion. In Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir.1976), the Second Circuit held that under section 552 (a)(4)(E) a judgment is not an absolute prerequisite to an award of attorney fees. Judge Friendly thought it clear that Congress did not mean that, where a FOIA suit had gone to trial and developments made it apparent that the Judge was about to rule for the complainant, the government could abort an award of attorney fees by an eleventh hour tender of the information requested.

Various district courts are in agreement with the Second Circuit. In Goldstein v. Levi, 415 F.Supp.303,305 (D.D.C. 1976), Judge Parker held that the purpose of section 552(a)(4)(E) was to encourage private citizens to bring to the attention of the courts any unlawful withholding of information by government agencies. The Court reasoned that this purpose would be defeated and frustrated if complaints were forced to forfeit their claim for fees upon the surrender of the materials before formal action by the Court.

In Communist Party of the United States v. Department of Justice, No. 75-1770, Slip op. at 3(D.D.C. March 23, 1976), Judge Flannery expressed the view that:

> [i]f the government could avoid liability for fees merely by conceeding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties

who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

Finally, in Kaye v. Burns, 411 F. Supp. 897,902 (S.D.N.Y. 1976), Judge Carter stated that it was inconceivable that the recovery of attorney fees could be foreclosed whenever the government chose to moot an action under the FOIA by supplying, during the pendency of the litigation, the material sought in the complaint. The Court concluded that a proper construction of the "substantially prevailed" requirement in light of section 552(a)(4)(E)'s legislative history and intent, would not preclude the recovery of attorney fees and litigation costs where the government, after commencement of the litigation, had acted to moot the action by supplying the material sought.

Appellant did substantially prevail within the meaning of section 552(a)(4)(E). See American Federation of Government Employees v. Rosen, 418 F. Supp. 2t 209. The government, faced with the Vaughn v. Rosen indexing order decided to supply the material requested. The Court's order had a causative effect on the government's decision. The government decided to surrender the documents rather than go through a review by the Court or special master. The case would never have reached the status it did if Appellant had not doggedly pursued the matter.

[4] In enacting section 552(a)(4)(E) Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complaintant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action but prior to a judgment or a court order.

Although a complaintant may have substantially prevailed in an action, the award of costs and attorney

fees does not automatically follow. There are other factors which the Court should consider in determining the appropriateness of an award of costs and attorney fees. The conference report indicates that the criteria listed in an earlier senate report are to be considered as part of the existing body of law on the award of attorney fees.

[5] Whether the government's withholding of the information requested had a reasonable basis in law should be an important factor in the Court's exercise of its discretion under section 552(a)(4)(E). The FOIA requires disclosure upon request of identifiable agency records, unless those records fall within one of nine specific exemptions. NLRB v. Sears, Roebuck and Co., 421,U.S. 132, 136,95 S.Ct.1504,44 L.Ed.2d 29(1975). To satisfy the "reasonable basis in law" requirement it is not necessary for the Court to find that the information the government chose to withhold was in fact exempt. Keye v. Burns, 411 F.Supp. at 908. What is required is a showing that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.

In this case the government has not satisfied the reasonable basis requirement. At no stage in this litigation did the district court find that any parts of the documents were exempt. This confirms that the government had no reasonable basis for concluding the withholding to be proper. Even a development of the reasonableness of the government's opposition does not preclude a recovery of costs and attorney fees. It is but one aspect of the decision left to the discretion of the trial court.

The trial court issued an order on March 13, 1981 which granted Appellees an extension of time to April 15, 1981, in which to file a memorandum in opposition to Appellant's motion for attorney's fees. The time expired and no memorandum was filed in opposition to Appellant's request for attorney's fees and costs. The Court then ruled on April 21, 1981 that "an award of

attorney's fees is neither merited nor awarded".

Appellant submits that in enacting section 552(a)(4)(E) Congress sought to lower the barriers facing the average person requesting information. Furthermore, successful FOIA litigants enhance the public interest by bringing the government into compliance with the law. As agents of the national policy of public disclosure it is equitable that they be awarded for their service. Under current federal attorney fee statutes when the social service rendered by the prevailing party is substantial, the courts have been willing to dispense with formal and rigid attorney and client requirements. See Clark v. American Corp., 320 F.Supp.709(E.D.La.),aff'd 437 F2.d 959 (5th Cir. 1970). A successful FOIA litigant is entitled to similar consideration.

As a successful FOIA complaintant, Appellant has rendered substantial service to both the government by bringing it into compliance with the policy underlying the FOIA, and to the public at large by securing for it the benefits assumed to flow from public disclosure of government information.

Most successful FOIA actions result in the vindication of important benefits on the public generally. Consumers Union v. Board of Governors of the Federal Reserve System, 410 F.Supp.63 (D.D.C. 1976).

The facts in this case prove that Appellant vigorously litigated this suit and did substantially prevail.

CONCLUSION

For these reasons, the Petition for a Writ of Certorari should be granted.

Respectfully submitted,

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JUDGMENT OF THE DISTRICT COURT

The United States District Court for the Middle District of Florida, Tampa Division, John C. Amis, Jr., President, Amey + Monge, Inc. vs. Internal Revenue Service and Charles O. DeWitt, Director entered the following order on January 8, 1981: Plaintiff's motion to require detailed justification, itemization and indexing in a form to comport with Vaughn v. Rosen 484 F.2d 820 is granted.

On March 4, 1981 the Court issued an Order of Dismissal without prejudice to the rights of any party, to re-open the acton within 60 days, upon good cause shown, or to submit a stipulated form of final judgment.

On March 13, 1981 the Court issued an Order granting MoVant(s) until April 15, 1981 in which to file a memorandum in opposition to Plaintiff's motion for attorney fees.

On April 21, 1981 the Court issued an order that each party is to pay his own costs, and that the case stands finally dismissed.

On May 11, 1981 the Court granted Plaintiff's motion for a review of orders. The Court found them in good order and the case remained dismissed.

OPINION OF THE COURT OF APPEALS

The following Opinion was filed in the United States Court of Appeals for the Eleventh Circuit in Case No. 81-5433 on March 30, 1982.

Appellant Amis is the president of Amey + Monge, Inc. In January, 1980, the secretary of Amey + Monge wrote to the I.R.S. and requested copies of "any and all records pertaining to Amey + Monge, Inc.," pursuant to the Freedom of Information Act (FOIA). the I.R.S. processed the request and released copies of seventeen pages of documents Amis had requested, withholding other documents based upon the exemptions provided under 5 U.S.C. §§ 552(b)(3), (b)(7)(D). the I.R.S. claimed that release of the documents being withheld would interfere with ongoing enforcement proceedings, disclose

the identity of a confidential informant, and reveal information prohibited by statute.

Amis, proceeding *pro se*, filed a complaint under the FOIA and the Privacy Act seeking production of the requested documents for his inspection. In addition, Amis sought attorney's fees and costs. Amis then filed a motion under the authority of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), to require the I.R.S. to furnish a detailed justification for the claims of exemption, an itemization, and an index of the documents withheld.

At a hearing on all pending motions, the government argued that Amius had initiated the suit in order to compel the I.R.S. to release to him certain documents relating to an ongoing civil investigation of his tax liabilities. At the conclusion of the hearing, the district court ordered the I.R.S. to prepare, file and serve a Vaughn index within forty days.

On February 12, 1981, the I.R.S. determined that there no longer existed any reason to withhold the documents Amis had requested because the identity of the confidential informant had been revealed. The I.R.S. released all the documents previously requested, but expressly stated that the disclosure was not an admission that the documents had been improperly withheld.

Amis then filed a motion seeking to recover attorney's fees and costs. The district court denied Amis' claim for attorney's fees and ordered each party to bear his own costs. We affirm.

Appellant contends that he is entitled to $6,057.50 as attorney's fees incurred in the FOIA litigaton. The FOIA, 5 U.S.C. § 552(a)(4)(E) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

With the exception of the substitution of "paragraph" for "section", the identical statutory provision appears in

the Privacy Act, 5 U.S.C. § 552 (g)(3)(B). In construing the attorney fees provision of the Privacy Act, the former Fifth Circuit concluded that attorney's fees could not be awarded to a *pro se* litigant who was not an attorney. Barrett v. Bureau of Customs, 651 F.2d 1087, 1089-90 (5th Cir. 1981). Although *Barrett* arose under the Privacy Act, rather than the FOIA, the Court recognized that its conclusion applied with equal force to the virtually identical provisions of the FOIA. *Id.*, at 1088-89. Amis is not entitled to attorney's fees.

Appellant also contends that he is entitled to recover his costs in bringing the action because he "substantially prevailed" in his suit against the I.R.S. The mere fact that the information he sought was not released until after the suit was instituted without more is insufficient to establish that a plaintiff "substantially prevailed". In the absence of a court order in his favor, a plaintiff must show: (1) that prosecution of the action could reasonably be regarded as necessary to obtain the information and (2) that the action had a substantive causation effect on the delivery of the information. Lovell v. Alderete, 630 F.2d 428, 432 (5th Cir. 1980). This record discloses that the only court order regarding the documents was that requiring the I.R.S. to submit a *Vaughn* index. Requiring a *Vaughn* index falls far short of a determination that disclosure of the documents being withheld is required; consequently, Amis must satisfy the *Lovell* criteria.

Here I.R.S. voluntarily released the documents it was withholding under a claim of exemption, after the identity of a confidential informant was revealed, thus, obviating the need for them to be withheld. Therefore, it appears that a change in circumstances, rather than the institution of the suit, was the causative factor in the delivery of the requested information. Under these facts, the district court's decision that each party bear its own costs did not constitute an abuse of discretion, *See, Lovell*, 630 F.2d at 431-32.

Affirmed.

NOTICE OF APPEAL

TO THE SUPREME COURT OF THE UNITED STATES

The following Notice of Appeal was filed in the United States Court of Appeals for the Eleventh Circuit, John C. Amis, Jr., President, Amey + Monge, Inc., vs. Internal Revenue Service and Charles O. DeWitt, District Director, No. 81-5439, on April 9, 1982.

Notice is hereby given that John C. Amis, Jr. the Appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Eleventh Circuit Court of Appeals which denied attorney fees and costs to Appellant on March 30, 1982.

This appeal is taken pursuant to 28 U.S.C.A. 1253.

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No. 81-2371

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN C. AMIS, JR., PRESIDENT, AMEY & MONGE, INC.,
PETITIONER

v.

INTERNAL REVENUE SERVICE AND CHARLES O. DEWITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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No. 81-2371

JOHN C. AMIS, JR., PRESIDENT, AMEY & MONGE, INC.,
PETITIONER

v.

INTERNAL REVENUE SERVICE AND CHARLES O. DEWITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below denying him attorney's fees and costs under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E).[1] That decision is correct, and the result in this case does not conflict with the decision of any other court. Thus, there is no basis for further review by this Court.

Petitioner is the president of Amey & Monge, Inc. In January 1980, the secretary of Amey & Monge, Inc., wrote to the Internal Revenue Service requesting, under the FOIA

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[1]Section 552(a)(4)(E) of 5 U.S.C. provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

and the Privacy Act of 1974, 5 U.S.C. 552a, copies of "any and all records pertaining to Amey & Monge, Inc." (Pet. App. A-1). The IRS processed this request only under the FOIA, because the Privacy Act does not apply to corporations. The IRS released copies of 17 pages of documents, but withheld the other requested documents, citing exemptions to the FOIA provided under 5 U.S.C. 552(b)(3), (b)(7)(A) and (b)(7)(D). Those exemptions permit an agency to withhold documents in cases in which the documents are specifically exempted from disclosure by statute, or in which their release would interfere with ongoing enforcement proceedings or disclose the identity of a confidential informant (Pet. App. A-1 to A-2).

In October 1980, petitioner, acting pro se, filed a complaint in the United States District Court for the Middle District of Florida seeking production of the contested documents pursuant to the FOIA and the Privacy Act, as well as damages, attorney's fees and costs. Petitioner then filed a *Vaughn*[2] motion requesting detailed justification, itemization and indexing of the documents (Pet. App. A-2).

At a hearing held in January 1981, the government argued, *inter alia*, that petitioner had initiated the suit in order to obtain documents relating to an ongoing civil investigation of his tax liabilities (Pet. App. A-2). At the conclusion of the hearing, the district court ordered the IRS to file a *Vaughn* index within forty days (*ibid.*). On February 12, 1981, the IRS released all of the requested documents, explaining that the identity of the confidential informant whom the IRS had sought to protect had been revealed, so that there was no longer a need to withhold the documents (*ibid.*). Petitioner then filed a motion seeking

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[2] *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

attorney's fees in the amount of $6,057.50 and costs (*ibid.*). In April 1981 the district court denied petitioner's claim for attorney's fees and ordered each party to bear its own costs (*id.* at A-1 to A-2).

On March 30, 1982, the court of appeals affirmed in an unpublished per curiam opinion (Pet. App. A-1 to A-3). The court of appeals concluded that attorney's fees could not be awarded to a pro se litigant under the FOIA and, in addition, that petitioner had not "substantially prevailed" in his suit within the meaning of the FOIA (*id.* at A-3). The court noted that petitioner had never obtained a court order requiring disclosure of documents. Therefore, the court concluded that in order to meet the "substantially prevailed" standard under the FOIA petitioner would be required to show that his suit could reasonably be regarded as necessary to obtain the information and that the suit had had a substantial causative effect on delivery of the information (*id.* at A-3). The court concluded that it had been a change in circumstances, *i.e.*, revelation of the identity of a confidential informant, that had led to delivery of the information, rather than the institution of petitioner's suit. The court therefore concluded that the district court's decision that each party should bear its own costs was not an abuse of discretion (*ibid.*).

1. The court of appeals followed *Barrett* v. *Bureau of Customs*, 651 F. 2d 1087 (5th Cir. 1981), cert. denied, No. 81-5633 (Feb. 22, 1982), in holding that petitioner, as a pro se litigant, was not entitled to attorney's fees under the FOIA.[3] Petitioner cites no authority for the proposition that the FOIA authorizes payment of attorney's fees to pro

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[3] *Barrett* involved the attorney's fee provision of the Privacy Act of 1974, 5 U.S.C. 552a. However, the Fifth Circuit noted in *Barrett* that the attorney's fee provisions of the Privacy Act and of the Freedom of Information Act are virtually identical. 651 F. 2d at 1088.

se plaintiffs but merely argues that he should receive such fees because he allegedly has performed a public service (Pet. 7). The court of appeals' conclusion is consistent with that of the great majority of the circuits that have considered whether attorney's fees are available to pro se litigants under the FOIA and under other statutes with similar attorney's fee provisions.[4] These courts have correctly concluded that the language, legislative history, and purpose of the attorney's fee provisions of the FOIA and similar statutes indicate that Congress did not intend that fees be awarded to pro se litigants—any more than they authorize the awarding of hypothetical "fees" for attorneys who might reasonably have been, but were not, hired in addition to an attorney or attorneys actually utilized.

2. Even if petitioner were not a pro se litigant, he would not be eligible for an award of either attorney's fees or costs because he did not "substantially prevail" in his suit, as required under the terms of 5 U.S.C. 552(a)(4)(E). The

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[4]See *Crooker* v. *United States Department of Justice*, 632 F. 2d 916, 920-922 (1st Cir. 1980) (FOIA); *Cunningham* v. *FBI*, 664 F. 2d 383 (3d Cir. 1981) (FOIA); *White* v. *Arlen Realty & Development Corp.*, 614 F. 2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980) (Truth in Lending Act, 15 U.S.C. 1640(a)(3)); *Davis* v. *Parratt*, 608 F. 2d 717 (8th Cir. 1979) (Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); *Hannon* v. *Security National Bank*, 537 F. 2d 327 (9th Cir. 1976) (Truth in Lending Act); *Burke* v. *United States Department of Justice*, 559 F. 2d 1182 (10th Cir. 1977) (FOIA). But see *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 5-6 (D.C. Cir. 1979) (FOIA); *Marschner* v. *Department of State*, 470 F. Supp. 196, 201 (D. Conn. 1979) (FOIA).

Petitioner cites *Clark* v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), aff'd, 437 F. 2d 959 (5th Cir. 1971), for the proposition that courts have been willing to dispense with formal attorney-client requirements under attorney's fee statutes (Pet. 7). However, *Clark* did not involve a pro se litigant, but rather the question whether a litigant's fee arrangements with out-of-state lead counsel should affect the award of attorney's fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Thus *Clark* has no application to the present case.

court of appeals' conclusion that petitioner did not substantially prevail rests on a determination of fact that should not be reversed on appeal unless it is clearly erroneous. See *Chilivis* v. *SEC*, 673 F. 2d 1205, 1212 (11th Cir. 1982); *Ginter* v. *IRS*, 648 F. 2d 469, 471 (8th Cir. 1981); *Crooker* v. *United States Department of Treasury*, 663 F. 2d 140, 142 (D.C. Cir. 1980). Petitioner argues that he substantially prevailed because the government ultimately released all of the documents he had requested (Pet. 5). However, the attorney's fee provision of the FOIA was not intended to provide an automatic fee to any litigant simply because a suit was brought and the requested information was then furnished. See, *e.g.*, *Ginter* v. *IRS*, *supra*, 648 F. 2d at 470-471; *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 6 (D.C. Cir. 1979); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F. 2d 509, 514 (2d Cir. 1976). A number of courts have held, as did the court of appeals here, that, in order to meet the "substantially prevailed" test in the absence of a favorable judgment, a FOIA litigant must show (1) that a suit could reasonably have been regarded as necessary; and (2) that the suit was a substantial causative factor in obtaining release of the information. See, *e.g.*, *Chilivis* v. *SEC*, *supra*, 673 F. 2d at 1212; *Fund for Constitutional Government* v. *National Archives and Records Service*, 656 F. 2d 856, 871 (D.C. Cir. 1981); *Ginter* v. *IRS*, *supra*, 648 F. 2d at 471; *Lovell* v. *Alderete*, 630 F. 2d 428, 432 (5th Cir. 1980); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, *supra*, 546 F. 2d at 513.

Petitioner did not obtain a court order for release of the documents, but only an order requiring the government to submit a *Vaughn* index so that the court could decide whether the IRS had properly withheld the documents. The court of appeals correctly concluded that the latter order was not sufficient to meet the "substantially prevailed" test (Pet. App. A-3). Moreover, as the court of appeals found,

the government voluntarily released the documents not because of petitioner's suit, but because of changed circumstances, *i.e.*, revelation of the identity of the confidential informant. Although the release of the documents occurred after the government had been ordered to file a *Vaughn* index, the timing was a coincidence, dictated by developments in other litigation involving petitioner and the IRS. Thus, petitioner's suit was not a substantial causative factor in the release of the documents. It follows that petitioner did not "substantially prevail" in his suit, and he may not recover attorney's fees or costs under the terms of the FOIA.[5]

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[5]Petitioner cites several district court decisions in support of his argument that he should be held to have substantially prevailed (Pet. 4-5). All are distinguishable from the present case. In three of the cases litigants were held to have substantially prevailed where the government apparently released the requested documents without explanation, or with an unacceptable explanation, soon after the plaintiff had filed an FOIA suit. See *American Federation of Government Employees* v. *Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976); *Goldstein* v. *Levi*, 415 F. Supp. 303 (D.D.C. 1976); *Communist Party of the United States* v. *United States Department of Justice*, Civil No. 75-1770 (D.D.C. Mar. 23, 1976) slip op. 3-4. In contrast, here the government indicated a valid reason for the timing of release of the documents. In *Kaye* v. *Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976), the court stated that release of documents prior to final judgment does not necessarily preclude a litigant from meeting the "substantially prevailed" requirement. *Id.* at 902. However, the court declined to award attorney's fees. It concluded that the Federal Reserve Board had reasonably withheld the requested document, which appeared to contain material exempt from disclosure under the FOIA. In addition, the court noted that the content of the document related to the subject matter of a federal grand jury investigation and suggested that this fact might have justified the Board's withholding of the document. *Id.* at 904 n.10. It also noted that plaintiff had brought his FOIA suit to further his own commercial interest, in particular his litigation with the company that was the subject of the document. *Id.* at 905. If anything, the court's denial of attorney's fees in *Kaye* v. *Burns* suggests that fees and costs were properly denied in the present case.

3. Petitioner's contentions (Pet. 6-7) with respect to whether the IRS had a reasonable basis in law for withholding the documents and whether his suit provided a public benefit are irrelevant to the question whether he substantially prevailed in his suit. These factors are considered by a court in the exercise of its discretion to award or deny attorney's fees only *after* it concludes that a litigant has substantially prevailed. See, *e.g., Stein* v. *Department of Justice*, 662 F. 2d 1245, 1262 (7th Cir. 1981); *Fund for Constitutional Government* v. *National Archives and Records Service, supra*, 656 F. 2d at 870-873; *Crooker* v. *United States Department of Justice*, 632 F. 2d 916, 922 (1st Cir. 1980). Because petitioner has not demonstrated that he substantially prevailed, there is no occasion for consideration of his additional contentions.[6]

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[6]In any event, it is clear that, even if petitioner had substantially prevailed, the considerations he mentions would not weigh in favor of an award of fees or costs. Petitioner's suit involved a solely private interest, relating to litigation between petitioner and the IRS. Compare *Chamberlain* v. *Kurtz*, 589 F. 2d 827, 842 (5th Cir.), cert. denied, 444 U.S. 842 (1979) (denying attorney's fees in part because documents were sought in connection with possible deficiency claim against litigant and thus served a personal and pecuniary interest). Despite petitioner's contention to the contrary (Pet. 7), no substantial public benefit resulted from release of the documents in question. Nor is there any basis for petitioner's claim (*id.* at 6) that the IRS lacked a reasonable basis in law to withhold the requested records. Petitioner has not shown that the IRS was incorrect in its conclusion that the requested documents were exempt from disclosure under the cited portions of the FOIA. Indeed, the record demonstrates instead that the government turned over the documents promptly upon learning that the identity of a confidential informant had been revealed, so that the primary justification for withholding the documents no longer existed (Pet. App. A-2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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